

Ethiopian Law of Execution of Foreign Judgements

By Ibrahim Idris Ibrahim*

Introduction

The world today presents a picture of diverse states the interactions of which in different spheres of life often result in conflicting international legal situations. These conflicting international situations have immensely been enhanced as a result of the highly developed transportation and telecommunication system the world has witnessed over the last several decades. The interactions of nationals and domiciliaries of different states in such areas as family relations, trade, commerce, investment and etc. have become the cause for the creation of contacts between the laws of such states which eventually compete to dominate the resulting conflict in legal situations. In the desire to address those conflicting legal situations created, states have adopted 'Private International Law' or 'Conflict of Laws Rules'. 'Private International Law' helps these states to get answers concerning the determination of the court having jurisdiction over a case involving foreign elements, i.e., matters involving the laws of two or more countries, the selection of appropriate governing law or the conditions under which a foreign judgement could be recognised and /or executed.

The execution of foreign judgement, the topic which this short article purports to address, is an important aspect of Private International Law. In order to assist their courts resolve problems associated with the execution of judgements rendered by other states, quite several states have adopted legislation which also include provisions on the execution of foreign judgements. Many states have also entered into a treaty or convention, bilateral or multilateral, involving the execution of foreign judgements.

Like several other states, Ethiopia, desiring to address conflict of laws situations under which foreign judgements could be executed, has adopted its own law. This law which includes only a few provisions is incorporated in the Ethiopian Civil Procedure Code of 1965 under the section the 'Execution of Foreign judgements and Arbitral Awards'. Needless to mention, the draft rules of Private International Law prepared by Professor Rene David which was supposed to appear as part of the Ethiopian Civil Code of 1960 did not include any provision on the execution of foreign judgements.

As a close look into the Civil Procedure Code's provisions on the Execution of Foreign Judgements and Arbitral Awards will evidence, and as would be shown later, apart from the fact that principles embodied therein are difficult to understand and apply, they are so broadly formulated that they can not accommodate as many legal situations as are required of any law governing the execution of foreign judgements. The absence of judicial practice and developed legal literature pertaining to the execution of foreign judgements in Ethiopia has also frustrated the application of the Code's provisions by the courts. Of those few Private International Law cases so far decided by Ethiopian courts, only two cases relating to execution of foreign judgements and cited in this

* Assistant Professor of Law, Faculty of Law, Addis Ababa University (Former Dean of the Faculty).

article have been identified by the author. It is also unfortunate that the issue pertaining to execution of foreign judgements in Ethiopia has for many years been given little attention in the academic circle. For instance, Professors Sedler and Singer, former members of the Faculty of Law of Addis Ababa University, did not give any coverage to the issue in their respective materials (i.e. Conflict of Laws Rules for Ethiopia and Materials for the Teaching of Private International Law in Ethiopia) they prepared for the study of Private International Law in Ethiopia.

In the post Ethio-Italian War of 1935-1940 period, it is true that Ethiopia and Ethiopians have established much contacts with the outside world. Large number of Ethiopians have, for one reason or another, started to live in neighbouring and far away countries, and quite many foreigners are permanently or temporarily residing in Ethiopia. During the seventeen years rule of the Derg and after, Ethiopians left the country to live in other countries, in an unprecedented scale. Over the last few years, following the country's decision to adhere to principles of market economy, the contacts the country is making with the outside world is on the increase compared to, for instance, the Derg era. The country has been open to foreign investors. The volume of international business with which the country is involved appears to be on the rise.

Undoubtedly, political, economic, social and cultural relations would give rise to the proliferation of contacts, which in turn would result in conflicts between Ethiopian laws and the laws of other countries. Consequently, there will be a likelyhood of high rise in conflict of laws situations that need to be addressed. It would therefore become essential for Ethiopia to revise, among many other things, its Civil Procedure Code's provisions on the execution of foreign judgements with a view to making them pertinent for the inevitable and complex problems relating to foreign judgements.

In this article, therefore, an attempt is made to examine the application of the Code's provisions on the execution of foreign judgements, and to suggest possible solutions to legal situations in relation to which the Code has failed to render assistance. In doing so, the article, it is hoped, may contribute towards the giving some insights into the need for the revision of the provisions of the Civil Procedure Code, and in the meantime the easing of the difficulty confronted by the Ethiopian courts in the application of the Code's provisions.

As the practices of the Ethiopian courts reflected in the decisions they rendered on cases involving Private International Law situations would show, in those circumstances in which the courts couldn't get relevant provisions to guide them solve the legal problems with which they were confronted, they had the tradition of resorting to foreign laws and accepted practices. In view of the absence of legislated rules directing as to whether to follow the principle of nationality or domicile on the basis of which problems of personal status in Private International Law could be determined, the Supreme Court was known to have resorted to the jurisprudence of

foreign countries.¹ Similarly, the author hopes that, in understanding the principle pertaining to the execution of foreign judgements, Ethiopian courts might find this paper helpful in their endeavour to seek internationally accepted principles on the basis of which to address significant legal issues of Private International Law.

Ethiopian Principle of Execution of Foreign Judgements

It is evidently true that, however internationally minded a state may be, foreign judgements cannot command unconditional execution by the courts of that state.² In the absence of international treaties or conventions providing otherwise, a state to whose court a foreign judgement has been submitted for execution usually insists that the foreign judgement should meet the requirements laid down in its national laws.

Under international Law, there are now two widely accepted modes concerning the execution of foreign judgements.³ The first is exemplified by the laws of continental Europe and Latin American countries. According to the laws of these countries, foreign judgements are accorded enforcement only after the satisfaction of prescribed conditions, and after an *exequatur*⁴ is written and authorised recognition has been granted.⁵ In the law of these countries, a foreign judgement, until supported by a formal decision of enforcement (*exequatur*) passed by a tribunal of the country in which it is desired to be enforced, will have no effect in that country. In the laws of such country, a foreign judgement is, therefore, not regarded as conclusive.⁶

The other mode is characteristic of the laws of the Anglo-American countries.⁷ In accordance with the laws of these countries, foreign judgements are not executed as such, but are endorsed by a domestic judgement, i.e. judgement by judgement. Foreign judgements are accepted as conclusive provided that certain conditions provided

¹ In *Hallock v. Hallock* (Supreme Court Ct., Case No. 247/50) the Supreme Court of Ethiopia gave its justifications for the need to resort to foreign law and practice where circumstances required. The Court stated : "... There is no codified law at present in Ethiopia with regard to rules of private international law nor with regard to the jurisdiction of the courts in matters where, as in the present case, the personal status of foreign nationals may be affected and a conflict of laws may therefore arise. In default of an express provision of law on the subject, it is necessary to turn to general possible principles of jurisprudence accepted in other countries."

² Robert N. Hornick, *The Recognition and Enforcement of Foreign Judgements in Indonesia*, *Harvard Law Journal*, Vol. 18, 1977, pp. 77-88.

³ Earnest G. Lorenzen, *the Enforcement of American Judgements Abroad*, *Yale Law Journal*, Vol. 29, 1919-20, pp.192-193.

⁴ An *exequatur* is a form of proceeding which means a retrial of the foreign judgement
⁵ Earnest. G. Lorenzen, p. 193.

⁶ The French custom of denying conclusive effect to foreign judgements as a matter of law goes back to the so-called Code Michaud of 1629. See Kurt H. Nadelman, *Non- Recognition of American Money Judgement Abroad and What to Do About It?*, *Iowa Law Review*, Vol. 42, 1957, p. 238.

⁷ Earnest G. Larenzen, P.193.

in the law of the country in which the judgement is sought to be enforced are satisfied.⁸ For instance, in English law, foreign judgements are accepted as conclusive if the following conditions are met:

- “ 1. The foreign judgement must be final and conclusive in the country in which it was pronounced;
2. The foreign courts in question must have been competent to adjudicate upon the matter in question;
3. The judgement must not have been obtained by fraud;
4. The judgement must not have been obtained by proceedings contrary to natural justice;
5. The judgement must not have been based upon a cause of action contrary to English public policy;”⁹

In the United States, foreign judgements are also recognised and executed as a matter of comity as conclusive judgements, provided, however, certain requirements are met. These requirements which were established in *Hilton v. Guyot* case are: *one*, there has been a full and fair trial conducted by the foreign court; *two*, the foreign court has a competent jurisdiction; *three*, the foreign court has conducted the trial upon regular proceedings; *four*, the defendant has been given due service or voluntarily appeared before the court; *five*, there is a system in the country of the foreign court likely to secure an impartial administration of justice between the citizens of its own country and those of other countries; *sixth*, there is nothing to show either a prejudice in the court, in the system of the laws under which it was sitting or fraud in procuring the judgement, or any other special reason why the comity of the United States should not allow its full effect; and *seventh*, the requirement of reciprocity is met.¹⁰

As close examination of the Ethiopian law of the execution of foreign judgement would suggest, of the aforementioned two internationally accepted requirements for executing foreign judgements, Ethiopian law seems to have adhered to the second. As would be discussed later, under Ethiopian law, before a foreign judgement is given effect, it is necessary that a domestic judgement must be pronounced. In order to render a domestic judgement which confirms the foreign judgement, the court is bound to ascertain if the conditions stated in the Civil Procedure Code are met.¹¹ Comparison of Ethiopian law with the English and United States laws shows that the conditions enumerated in the Ethiopian law are by and large similar to those outlined in the laws of these two countries. The conditions laid down in the Code (Art 458) as prerequisites for the execution of foreign judgements in Ethiopia are:

⁸ The common law rule that a judgement from a foreign court with proper jurisdiction will be given conclusive effect was established definitively by the courts of Westminster of Foreign Judgements in Canada, *The Canadian bar Review*, Vol. 39, 1960, p.69 see also the case *Godard v. Grey* (1870), L. L. 6. Q. B. 139.

⁹ The Foreign Judgements (Reciprocal Enforcement) Act, 1933, C. 13, Sections 1 to 5. See also R.H. Graveson, *The Conflict of Laws*, 6th Edition, 1969, pp. 663-680.

¹⁰ *Hilton v. Guyot*, 159 U.S., 113.

¹¹ *The Ethiopian Civil Procedure Code of 1965*, Article 458.

- “ a) the execution of Ethiopian judgements is allowed in the country in which the judgement to be executed was given;
- b) the judgement was given by a court duly established and constituted;
- c) the judgement-debtor was given the opportunity to appear and present his defence;
- d) the judgement to be executed is final and enforceable; and
- e) execution is not contrary to public order or morals.”

Ethiopian Law allows the execution of foreign judgement on the basis of fulfilment of the aforementioned conditions. This is true where there is no binding international convention on the execution of foreign judgements. As far as the knowledge of the author goes, Ethiopia has as yet not become a party to any treaty or convention on the execution of foreign judgements. In view of the absence of any international treaty or convention on the execution of foreign judgements binding Ethiopia, the fulfilment of the conditions provided in the Code has, therefore, become the prerequisite for a foreign judgement to be executed in Ethiopia.¹²

¹² Ethiopian law contains no provisions pertaining to the requirements for the recognition of foreign judgements in Ethiopia. Concerning the non-inclusion of pertinent provisions on recognition of foreign judgements in the Civil Procedure Code of Ethiopia, the writer feels the omission was not made deliberately. Rather, the writer considers the following to be the major reasons for the omission of the provisions: *firstly*, unlike the Civil Code of the 1960, the Civil Procedure Code was not the product of the then Ethiopian Parliament, which had the practice of enacting a law after the draft was prepared and thoroughly discussed by a Codification Commission. Instead, the Civil Procedure Code was issued by the late former Emperor Haile Selassie I in the form of a Decree, while Parliament was not in session. Moreover, unlike other Decrees, the Code was not submitted for approval to Parliament, pursuant to Article 92 of the Revised Constitution of 1955, and, because of this, the Decree was not accorded the opportunity for possible improvement. *Secondly*, the draft of the Civil Procedure Code was basically the outcome of one-man effort. This expert prepared his translated draft mostly taken from the Indian Civil Procedure Code of 1908. Apart from not being accompanied by such relevant documents as *expose de motifs*, the draft was not subjected to thorough study and discussion by legal experts, as usually done for the other codes of Ethiopia, with a view to suggesting the inclusion of provisions such as those concerning the recognition of foreign judgements in Ethiopia. Be that as it may, it should be noted that (since recognition is a prerequisite for execution), if a foreign judgement is accepted for execution, the issue of whether or not the judgement should be recognised might not arise. Where it arises, there is no reason why Ethiopian courts cannot address the issue in either one of the following alternatives: a) in view of the fact that execution may also presuppose recognition, Ethiopian courts may be at liberty to extend the application of the provisions or conditions for execution of foreign judgements provided in the Ethiopian Civil Procedure Code to matters concerning foreign judgements requiring recognition; or (b) they may look into the experiences of other countries, and adopt those conditions they feel are appropriate to the Ethiopian situation, as they have frequently done in respect of legal situations in many other circumstances.

The conditions set by the Ethiopian Civil Procedure Code are discussed below. Prior to proceeding to that, however, the author has found it appropriate to introduce the procedures followed in regard to the execution of foreign judgements.

Procedures for the Execution of Foreign Judgements

Under Ethiopian law, no foreign judgement may be executed without the filing of an application to a court to that effect.¹³ The appropriate court to which an application should be made is the Federal High Court of Ethiopia.¹⁴ Any application for the execution of a foreign judgement must be made in writing and accompanied by a certified copy of the judgement to be executed¹⁵ and a certificate signed by the president or the registrar of the foreign court rendering the judgement which states that the judgement is final and enforceable.¹⁶

Regarding the copy of the judgement, two questions may be asked. Should the copy of the foreign judgement be translated into Amharic which is the working language of the Federal High Court¹⁷ from whatever language it was pronounced in? For instance, in many Latin American countries, including Chile¹⁸ and Colombia,¹⁹ and also in the former Soviet Union,²⁰ there has been a rule providing for the translation of a foreign judgement into an official language as a requirement for the execution of that judgement.²¹ The Venezuelan law also requires a certified and legalised copy of the foreign judgement.

According to the Chilean Law, the foreign judgement rendered in a foreign language must be translated by the party seeking recognition and/ or execution, and if the other party challenges the translation, it should be revised by an official translator.²² In the law of Brazil, it is a requirement that the foreign judgement must be accompanied by a translation into Portuguese, and that this translation must be one made by an official Brazilian translator.²³

Should not the foreign judgement also be authenticated by an Ethiopian consulate in the jurisdiction in which the foreign judgement was rendered? According to the laws of many countries, and also in certain international legislation,²⁴ this form of authentication

¹³ The Ethiopian Civil Procedure Code, Article 456(2).

¹⁴ Federal Courts Establishment Proclamation No. 25, *Neg. Gaz.*, Year 2, No. 13, 1996, Art. 11(2) (a).

¹⁵ The Ethiopian Civil Procedure Code, Article 457(b).

¹⁶ *Ibid*, Article 457(a).

¹⁷ *The Constitution of the Federal Democratic Republic of Ethiopia, 1994*, Article 5(2).

¹⁸ Alfred Etcheberry O., *American-Chilean Private International Law*, 1960, p. 88.

¹⁹ Phanor J. Eder, *American-Colombian Private International Law*, 1956, p. 72.

²⁰ *The Fundamentals of Civil Procedure Code of the USSR*, Article 63.

²¹ Richard S. Lombard, *American-Venezuelan Private International Law*, 1965, p. 103.

²² Alfredo Etcheberry O.S, 1960, p.88.

²³ Paul Griffith Garland, *American-Brazilian Private International Law*, 1959, p.93.

²⁴ *The Hague Convention of 17 July 1905*, Article 19. See also *The Hague Convention of 5 October 1961*.

of a foreign judgement is a requirement. For example, under the law of Brazil, the legalisation of a foreign judgement by a Brazilian consulate is mandatory.²⁵

When turning our attention towards Ethiopian law, we find that no express provision in the Code requires the translation of a foreign judgement desired to be executed in Ethiopia into Amharic, nor is there one requiring an authentication of that judgement by the appropriate Ethiopian consulate. According to Article 457 of the Civil Procedure Code, a foreign judgement brought before an Ethiopian court for execution needs to be certified by the president or registrar of the concerned foreign court, and submitted to the Ethiopian Federal High Court accompanied by the application for execution. That is what the Law says. On the other hand, one can not ignore the judicial practice that has started to develop over the years, and according to which a foreign judgement submitted to an Ethiopian court for execution is required to be translated into Amharic and be authenticated by the Ethiopian consulate in the country in which the judgement was pronounced.²⁶

An Ethiopian court to which an application for execution of a foreign judgement is filed is required to enable the party against whom the judgement is liable to be executed to present his observation within such time as the court shall fix.²⁷ The court is empowered to decide whether or not pleadings may be submitted.²⁸ Where it believes that there are doubts as to certain points, the court may suspend its decision, pending the clarification of the doubtful points.²⁹ In principle, the court decides on the basis of the application submitted to it. However, in case of special reasons which the court records, as, for example, when a judgement debtor objects to the executions of the judgement for lack of fulfilment of one or more of the conditions for execution of foreign judgements in Ethiopia, the court may order that a hearing attended by both parties be held.³⁰ Where the application is allowed and the application to have it executed is granted, the foreign judgement is executed as though it were given by the Ethiopian Court,³¹ and a decision on costs in Ethiopia may also be rendered.³²

Reciprocity

Reciprocity is one of the requirements recognised in Ethiopian law for the execution of foreign judgements. The Code provides that execution of a foreign judgement cannot be granted in Ethiopia unless 'the execution of Ethiopian judgements is allowed in the country in which the judgement to be executed was given.'³³ In upholding this principle, Ethiopian law follows the course chosen by many other legal systems,³⁴ which incorporate in their laws the requirement of reciprocity in order to ensure, *inter*

²⁵ Paul Griffith Garland, 1959, p.93.

²⁶ Mohammed Ali Mujahid v. Prosecutor of the Special Court of Ethiopia. Appeal file No. 47/78(27/7/1979 Eth. Calendar). Interview made with some Ethiopian judges.

²⁷ *The Ethiopian Civil Procedure Code*, Article 459 (1).

²⁸ *Ibid*, Article 459(2).

²⁹ *Ibid*, Article 459(3).

³⁰ *Ibid*, Article 460(1).

³¹ *Ibid*, Article 460(3).

³² *Ibid*, Article 460(2).

³³ *Ibid*, Article 458(a).

³⁴ Istvan Szaszy, *International Civil Procedure*, 1967, p.186.

alia, that the foreign state recognises the judgements rendered by their courts. In this connection, Robert A. Sedler maintains:

“If the courts of the country (a foreign country) refuse to execute Ethiopian judgements, the Ethiopian court must, in turn, refuse to execute theirs. In as much as most countries will execute the judgement of other countries, it should be presumed that any country will execute an Ethiopian judgement unless the contrary is provided”.³⁵

A defendant who intends to attack the execution of a foreign judgement among others, would be expected to plead and prove that the foreign court rendering the judgement in question would refuse to execute a judgement pronounced by an Ethiopian court. Where the Ethiopian court is satisfied by the proof presented by the defendant, the application to have the foreign judgement executed in Ethiopia will not be granted. In relation to the need of proving that the foreign court would grant execution to a judgement of the Ethiopian forum, the experiences of states might be different. In the United States, it is customary to show reciprocity by an affidavit of two American lawyers, and that these lawyers must be those practising in the state before whose court the foreign judgement is submitted for execution.³⁶ In the Law of Venezuela, the courts must be satisfied in each case that reciprocity exists.³⁷

The doctrine of reciprocity which has retaliation against a state as its basis, but which may simultaneously victimise innocent individuals,³⁸ has been a controversial issue since 1895, when the case of *Hilton v. Guyot* was decided by the Supreme Court of the United States. Since then, criticism has grown against refusing to execute a foreign judgement for reasons of lack of reciprocity. It is argued that reciprocity might cause injustice to an individual foreign litigant because of the policies of the country whose court has rendered the judgement. There are arguments that the practice of reciprocity should be eliminated.³⁹

Interestingly, many states do not include reciprocity as a prerequisite for the execution of foreign judgements. Argentina is one of those Latin American countries which do not require reciprocity as a precondition for the enforcement of foreign judgements.⁴⁰

In Brazil, as well, recognition and execution of foreign judgements is not based on reciprocity. In the United States, despite the Supreme Court's decision in the Case of *Hilton v. Guyot*, many states, including New York and California, have rejected the

³⁵ Robert A. Sedler, *Ethiopian Civil Procedure*, 1968, p. 394.

³⁶ Richard S. Lombard, *American-Venezuelan Private International Law*, 1965, p.98.

³⁷ *Ibid.*

³⁸ Albert A. Ehrenzweig and Erick Jayme, *Private International Law*, 1973, p. 53.

³⁹ The American Restatement of Conflict of Law does not accept the doctrine of reciprocity. See Article 434, Comment b.

⁴⁰ Werner Goldschmidt and Jose Rodriguez-Novs, *American-Argentine Private International Law*, 1966, p.34

doctrine of reciprocity.⁴¹ Despite such criticism, however, the requirement of reciprocity still plays a significant role in many states, including, of course, Ethiopia.⁴²

A Court Duly Established and Constituted

The Code sets forth two issues affecting the court which rendered the foreign judgement: due establishment and due constitution.⁴³ In discussing these requirements, it becomes necessary to ascertain the appropriate law by which the foreign court is deemed duly established and constituted. Should such matters be determined on the basis of Ethiopian law? Or the foreign law? Or international law? No guidance is given by the Code, thus rendering the application of the criteria very difficult.

States establish institutions which they think appropriate to resolve various kinds of disputes. These may include institutions such as an admiralty court, a family council, an ecclesiastical court, an Islamic court. Let us assume, for example, that a certain type of court that rendered the judgement the execution of which is sought is unknown in the Ethiopian legal system. Should an Ethiopian court consider such foreign court as duly established, and consequently execute its judgement? If so, on the basis of what law?

A certain type of tribunal established in one state may be unknown in another state. In view of this fact, it would, therefore, be absurd to test the status of a court of one state by the law of another state which may not have an identical or even a similar court in its territory. In the opinion of this writer, it suffices for the Ethiopian court to resort to the law of the foreign country concerned to determine whether or not the tribunal rendering the judgement sought to be executed is one duly established.

Similarly, the determination of the jurisdiction of a foreign court is another difficult issue. Let us examine a hypothetical problem. A person obtaining a judgement against another person in France files an application to a court in Ethiopia for execution of the judgement. In assuming jurisdiction over the defendant, the French court may have acted in accordance with Article 14 of the French Civil Code, which empowers a French court to entertain a claim against a person whether or not he has French nationality or residence. On the other hand, because under Ethiopian law, residence of a defendant is a requirement for location of jurisdiction, should the Ethiopian court refuse to execute the French judgement, for the simple reason that the assumption of jurisdiction on the part of French court is inconsistent with the Ethiopian concept of jurisdiction? Which country's

⁴¹ Barbara Kulzer, Some Aspects of Enforceability of Foreign Judgements: A Comparative Summary, *Buffalo Law Review*, Vol. 16, 1966, pp. 90-91. In the Case *Eire v. RR Tompkins* the requirement of reciprocity these days, although the principle in the *Hilton V. Guyot* case has not been overruled by the Supreme Court, there is now a tendency for State Courts in the United States to be free to abandon the requirement of reciprocity. States can abandon the reciprocity requirement by court decisions (eg. *Island Territory of Curacao v. Salitron Devices, Inc.*, 489 F. 2d 1313 (2d Cir 1973) or by legislation (Restatement (Second) of Conflict of laws, No. 98 (1973) and Restatement (Third) of the Foreign Relations Law of the United States No. 481 (1987).

⁴² Donald P. Balke, Conflict of Laws: Effectes of Foreign Judgement, *Cornell Law Quarterly*, Vol. 12, 1926-27, pp. 62-66.

⁴³ *The Ethiopian Civil Procedure Code*, Article 458(b).

law should be taken as a basis to determine the jurisdictional competence of the French court? The Ethiopian Law? Internationally accepted rules? Again, on this question, the Code is silent and there has not evolved an Ethiopian judicial practice applicable to this situation.

In determining jurisdiction, a number of different methods may be observed in the world today.⁴⁴ In the Anglo-American legal systems and also in the laws of many Latin-American countries, jurisdiction is defined by the law of the *rendition forum*, i.e. the law of the country whose court has pronounced the judgment.⁴⁵

In the legal systems of such continental law countries as Greece,⁴⁶ Turkey⁴⁷ and Austria,⁴⁸ on the other hand, the jurisdiction of a court is ascertained on the basis of the law of the *recognition forum*, i.e., the law of the country in which execution of the foreign judgement is sought. For example, in Swedish Law, foreign judgements are recognised [and executed], if they are rendered by a court which had jurisdiction according to Swedish concepts and if that court has applied the substantive rules acceptable to the Swedish private international law.⁴⁹

In other legal systems, such as that of Venezuela, jurisdiction is understood in an international sense.⁵⁰ In French law, whether or not the foreign court had jurisdiction on the matter, is examined in the light of what is called a *double-barrelled* principle. According to this principle, the foreign court must have had: a) international requirement determined by Private International Law of the *rendition forum* and b) domestic jurisdiction to be determined in accordance with the law of the *rendition forum*.⁵¹

Indubitably, each of the aforementioned standards has its own weakness, rendering none of them worthy of being recommended for Ethiopia. If jurisdiction is to be defined by the law of the *rendition forum*, the following situation could be encountered: a judgement *in personam* (against an individual) may be rendered by a French court upon assuming jurisdiction over a non-resident defendant. Since, in the law of Ethiopia, it is residence of the defendant that serves as a ground for jurisdiction for purposes of judgement *in personam*, the execution of the judgement of the court of France contradicts with Ethiopian law. If, on the other hand, the jurisdictional grounds of *recognition forum* are chosen, this choice would evidently be adverse to the general notion that a court should have jurisdictional competence based upon its domestic

⁴⁴ J.G. Castel, Jurisdiction and Money Judgements Rendered Abroad: Anglo-American and French Practice Compared, *The McGill Law Journal*, Vol. 4, 1957, pp. 153-157

⁴⁵ Istvan Szaszy, pp. 269. See also Paul Griffith Garland, p. 94. See also Alfredo Etcheberry O. 1960, p.6.

⁴⁶ Albert A. Ehrenzweig, Charalambos Fragistas and Athanassios Kiano Pulos, *American-Greek Private International Law*, 1957, p.31.

⁴⁷ Turgue Ansay, *American-Turkish Private International Law*, 1966, P.69.

⁴⁸ Ignaz Seidl-Hohenveldern, *American-Austrian Private International Law*, 1963, p.96.

⁴⁹ Hakan Nial, *American-Swedish Private International Law*, 1965, P.69.

⁵⁰ Richard S. Lombard, pp.99-100. See also Walter S. Johnson, *Conflict of Laws*, 2nd Edition, 1962, p. 761.

⁵¹ George R. Delume, *American French Private International Law*, 1960, p 160.

law, and not on any other law, and that the existence of the domestic law evidences the existence of adequate proof of jurisdiction.

To define jurisdiction, as it is understood in the international sense, is not acceptable either, for the simple reason that, no international definition of jurisdiction commanding universal acceptance has evolved. The only attempt so far known to this author made to form an international definition of jurisdiction was that by the Bustamante Code of 1929, which unfortunately has not recorded a success in winning the acceptance of even those Latin American countries which took part in its drafting.⁵²

Insofar as the Ethiopian choice is concerned, it would be advisable to adhere to a method of definition of jurisdiction in which a compromise solution is attained: Ethiopian law may accept the law of the *rendition forum* in appropriate circumstances.⁵³ Consequently, care must be taken so that Ethiopian courts in matters pertaining, for instance, to land situated in Ethiopia or to a patent recognized and registered by the government of Ethiopia are not ousted of the jurisdiction they acquire under Ethiopian law. The assumption of jurisdiction by a foreign court must also not be incompatible with the general principles of international law. In cases where the jurisdiction assumed by the foreign court rendering the judgement is found to be repugnant to the Ethiopian interests, or that the jurisdiction is considered to be of Ethiopian courts exclusively, the foreign judgement should not be executed in Ethiopia.

In this connection, it is worthwhile to cite a very early decision of the High Court of Ethiopia in which a request for compliance with a foreign judgement was, in the absence of local jurisdiction, rejected.⁵⁴ This foreign judgement was pronounced by the Court of Bombay, India, and the subject matter was a piece of land, situated in Ethiopia, and possessed by a foreign national. The High Court of Ethiopia treated the case afresh, and decided that land situated in Ethiopia should be disposed of in accordance with the law of Ethiopia, and, of necessity, by an Ethiopian court.

Opportunity by the Judgement-Debtor to Present and Defend his Case

Under Ethiopian law, the requirement that a judgement-debtor should be given an opportunity to appear and present his defence is another condition necessary for the execution of a foreign judgement.⁵⁵ The judgement-debtor must have been served with a summons in due time, so that he could avail himself of the opportunity to defend the case. If the debtor of a foreign judgement has not received a legally sufficient notice, because ineffective means were used when effective means were readily available, so that in consequence the debtor failed to appear in court, the foreign judgement cannot be executed.⁵⁶

⁵² *The Havana Convention on Private International Law*, 1928, also known as the Bustamante Code, adopted by 15 states of Latin America.

⁵³ Artur Nussbaum, *Jurisdiction and Foreign Judgements*, *Columbia Law Review*, Vol.4, 1941, p. 221.

⁵⁴ Norman Bentwich, *Private International Law in Ethiopia*, *The International Law Quarterly*, Vol. 4, 1951, p. 114.

⁵⁵ *The Ethiopian Civil Procedure Code*, Article 458(c).

⁵⁶ Robert A. Sedler, pp. 110-119.

Under international law and practice, a foreign judgement passed against a defendant who was not duly served in sufficient time with the document instituting the proceedings leads to a refusal of execution. The foreign court is duty bound to ensure that the defendant is informed in sufficient time of the suit instituted against him so that he can defend himself or his interests as the case may be. Here, it is worthwhile to take note that the court rendering the foreign judgement must be one having jurisdiction on the parties for the service it ordered to be regarded as acceptable. A personal foreign judgement rendered without jurisdiction on the parties is internationally invalid.⁵⁷

In Common Law, except in the event of a voluntary appearance, voluntary submission by agreements or becoming a shareholder in a company,⁵⁸ an actual service of proceeding within the territory of the court is an essential prerequisite, for a court to exercise jurisdiction in a personal action. In English law, courts do not recognise the power of a foreign sovereignty to extend its jurisdiction to a person beyond its territory, unless they were subject thereto by virtue of either domicile or citizenship. On the other hand, if a judgement-debtor has been given an opportunity to plead his case but failed to do so, a foreign judgement rendered *ex parte* may not be dismissed for lack of jurisdiction.

In international law, the law of the *rendition forum* is the law on the basis of which summons may be served on defendants. Where a foreign judgement is filed for recognition and /or execution, the fact that the standards employed as regards the issuance of services to the defendants must be found acceptable to the *recognition forum*. The nature of services given should be adequate to suggest basic fairness. The foreign judgement may not be executed if the *recognition forum* is convinced that the party was not given proper service of summons.⁵⁹

Finality and Enforceability of a Foreign Judgement.

The fourth prerequisite for the execution of foreign judgements in Ethiopian law refers to the fact that the judgement must be final and capable of being enforced.⁶⁰ In considering this prerequisite, an attempt should be made to answer the following questions. What do finality and enforceability mean? What sort of foreign judgements are deemed to be final and enforceable? Which country's law should be consulted to determine the finality and enforceability of a foreign judgement?

As is true of a number of other legal situations considered above, Ethiopian law does not include provisions which could help find solutions to these questions. The situation is exacerbated by the absence of judicial practice in the area. Due to this reason, in order to be able to address these questions from an Ethiopian point of view, resort to foreign laws and judicial practices may be helpful.

⁵⁷ Wharton, *Conflict of Laws*, 3rd Edition, p.649.

⁵⁸ R.H. Graveson, 1969, pp. 665-667.

⁵⁹ Istvan Szaszy, p. 574

⁶⁰ *The Ethiopian Civil Procedure Code*, Article 458 (d).

The concept of finality and enforceability implies that the foreign judgement sought to be executed is not liable to review, modification or be set aside by another judgement.⁶¹ The concept of finality, according to a British judge named Lord Herchell, implies that the judgement pronounced is conclusive, final, and for ever established the existence of rights of which it is made to be conclusive evidence in a country.⁶²

A judgement deemed final and enforceable is said to obtain a status of *res judicata*, and is, therefore, binding upon the parties to the suit in question.⁶³ It is maintained that the issue of finality of a foreign judgement (a judgement as defined by Ethiopian procedural law includes an order and a decree)⁶⁴ should be considered in the light of specific circumstances, which includes: judgements on appeal, *ex parte* judgements, a judgement the execution of which has been suspended by the court rendering the judgement, a judgement in which no definite amount or form of remedy for restitution is provided, an interlocutory order, a maintenance decree and a custody decree.

Because a foreign judgement may be executed only where it is final and enforceable, an application submitted for the execution of a foreign judgement on appeal or under review would undoubtedly not be accepted under Ethiopian law. A judgement *in default* of appearance of the defendant is also considered as final and enforceable, provided, however, that the court rendering the judgement had jurisdiction, that the defaulting party was given the opportunity to appear in court and present his defence but failed, or that he had not lodged an opposition to such a judgement within the period fixed by the law of the *rendition forum*, before the same court has pronounced the judgment.⁶⁵

Concerning a foreign judgement from which no appeal is pending but the execution of which has been suspended by the court of the *rendition forum*, the general practice is that the action on the judgement is maintainable, despite the views expressed by some courts that the plaintiff should be denied of the right of action on the judgement. But until the outcome of the *rendition forum* is known, execution may be suspended by the *recognition forum* as well.⁶⁶ However, its execution would be liable to suspension, until the suspended judgement is rendered definite by a subsequent judgement⁶⁷ of the *rendition forum*.

Other particular examples in reference to which the problem of finality and enforceability may appear are interlocutory orders, maintenance decrees and custody decrees. As regards a foreign interlocutory order, the accepted practice is to view the problem in the light of whether the order has been pronounced prior to, or together with the final judgement.⁶⁸ An interlocutory order rendered before the final judgement is given is obviously not considered to be final, and is therefore

⁶¹ Walter S. Johnson, *Conflict of Laws*, 2nd Edition, 1962, pp. 758-759.

⁶² *Nouvion v. Freeman*, 15 App. Cas.1. See Notes, *Law Quarterly Review*, Vol. 6, 1890, p. 238.

⁶³ J.H.C. Morris, *The Conflict of Laws*, 9th Edition, 1973, P. 1039.

⁶⁴ *The Ethiopian Civil Procedure Code*, Article 3.

⁶⁵ G. C. Cheshire, *Private International Law*, 2nd Edition, 1961, p. 659.

⁶⁶ Notes and Legislation: The Finality of Judgements in the Conflict of Laws, *Columbia Law Review*, Vol. 41, 1941, p. 889.

⁶⁷ *Ibid*, pp 889-890.

⁶⁸ *Ibid*, pp. 887-889.

unenforceable. Where, however, the order is rendered as part of the final judgement, it undoubtedly obtains finality and enforceability.⁶⁹

As a matter of general practice, a foreign maintenance decree is deemed final and enforceable, if the decree is not capable of variation.⁷⁰ Concerning those decrees for variable maintenance, some holdings pertaining to arrears and instalments which have fallen due have been agreed upon to be final and enforceable.⁷¹ Whether or not the status of finality and enforceability might also be attributed to a judgement involving the custody of a child, the usual practice is to tackle the issue by taking the best interests of the child into account.⁷²

With regard to the appropriate law of country by which the issue of finality and enforceability of a foreign judgement might be tested, two practices are recognised world-wide.⁷³ According to the first practice, to determine whether or not a certain judgement is final and enforceable, it is necessary to refer to the law of the country whose court pronounces the judgement or *the rendition forum*. The second practice argues in favour of the law of the court to whose jurisdiction the judgement has been referred for execution or *the recognition forum*. Though no express provision is available to this effect in Ethiopian law, the requirement embodied in the Civil Procedure Code that the foreign judgement must be accompanied by a certificate signed by the president or the registrar of the *rendition forum* to the effect that such judgement is final and enforceable, may imply that Ethiopian law has favoured the former practice.⁷⁴

Public Order and Morality

Under Ethiopian law, as is also true of the laws of many other countries,⁷⁵ meeting the requirement of public order and morality is also a prerequisite for the execution of a foreign judgment.⁷⁶ Public order is a doctrine which serves as a safety valve for a country to enable its courts to deny effect to foreign [laws and] judgements which, for one reason or another, should not be enforced.⁷⁷ The concept of morality also refers to the fact that those foreign judgements appearing repugnant to the conduct, customs or accepted practices of the society of the recognition forum would not be carried out. Since a foreign judgement contrary to the morals of a society also implies violation of the public order, the writer of this article concentrates his discussion upon the latter term.⁷⁸

⁶⁹ Arthur Von. Mehern and Donald T. Trautman, Recognition of Foreign Adjudication: A Survey and a Suggested Approach, *Harvard Law Review*, Vol. 81, 1968, p.58.

⁷⁰ J. H.C. Morris, p. 103.

⁷¹ G. G. Cheshire, p. 661.

⁷² Notes and Legislation: The Finality of Judgements in the Conflict of laws, *Columbia Law Review*, Vol. 41, 1941, pp. 887-888.

⁷³ *Ibid*, p. 566.

⁷⁴ *The Ethiopian Civil Procedure Code*, Art 457(b).

⁷⁵ Istvan Szaszy, *Private International Law in the European Peoples Democracies*, 1964, pp. 160-170.

⁷⁶ *The Ethiopian Civil Procedure Code*, Art. 458(e).

⁷⁷ Istvan Szaszy p.279. William E. Holder, Public Policy and National Preferences: The Exclusion of Foreign Law in English Private International Law, *International and Comparative Law Quarterly*, 1968, Vol. 17, Part 4, pp. 926-929.

⁷⁸ Istvan Szaszy, p. 578, see also the source cited at footnote 71 above.

The term, public order, is a difficult term to define, and several attempts to define it have proved to be a failure.⁷⁹ The most that can be said of the term is that it is a developed concept and that it finds its expression in various state's basic moral, ideological, social, economic and cultural ideas, and in constitutions, statutes, and practices of courts.⁸⁰ The execution of a foreign judgement which jeopardises such basic ideas, laws and court practices, therefore, cannot be granted for the reason that the public order of that country is endangered. Undoubtedly, this also applies for Ethiopia.

The concept 'public order' which is also referred to as public policy indeed plays a restrictive role against the execution of foreign judgements. Dicey and Morris wrote:

*"The Court will not enforce or recognise a right, power, capacity, disability, or legal relationship arising under the law of foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental policy in English law."*⁸¹

The employment of the principle of 'public order' does prevent the execution of foreign judgements, and this is the case with the law of every country. It is an essential requirement in the execution of foreign judgements. It helps prevent the application of foreign law on the basis of which the foreign judgement is rendered as being repugnant to the *recognition forum*. It also helps prevent injustice in the circumstance of the particular case before the court such as the harsh affliction of the foreign law in rendering the judgement.

Under Ethiopian law, the grounds on which foreign judgements could be denied execution for violating public order are not enumerated in the Code, nor has there been any attempt on the part of the courts to enumerate them. However, in the opinion of this writer, there are a series of internationally recognised grounds that may be employed by Ethiopian courts to deny execution of foreign judgements for 'public order' reasons. These include:

First, a foreign judgement obtained by fraudulent means, whether as the consequence of an act of the party in whose favour the judgement was given, or that of the foreign court is denied execution.⁸² For example, the doctrine of public order may be invoked when a foreign judgement is proved to have been procured by false evidence; as a result of the suppression of material facts which, if cited or discovered, would have affected

⁷⁹ Supra, note 2, p. 279. Nelson Enon Chong, Public Policy in the Conflict of laws: A Chinese Wall Around Little England? *International and Comparative Law Quarterly* Vol. 45, Part 3, 1966, pp. 634-637.

⁸⁰ The Public Policy Concept in the Conflict of Laws, *Columbia Law Review*, Vol. 33, 1933, p.514.

⁸¹ Dicey and Morris, *Conflict of Laws*, 8th Edition, 1967, p.72.

⁸² *The American Statement of Conflict of Law*, 1934, Comment (a) on Section 440.

the outcome of the case,⁸³ or where the foreign judges were themselves interested in the outcome of the action.⁸⁴

In English Private International Law, the condition that a foreign judgement sought to be executed in a country must have not been obtained by fraud is included in the law as an independent requirement.⁸⁵ A defendant in the foreign judgement is empowered to appeal against the execution of such judgement on the ground of fraud. Consequently, the court can hear and determine the very same evidence and defence tendered in the proceedings of the foreign court.⁸⁶ Where it is established that, for instance, the plaintiff had misled the foreign court to reach the judgement by way of perjury or the judges of the foreign court were interested in the subject matter of the case itself, English courts cannot enforce the foreign judgement. In the Ethiopian case, it could be argued the same way, for such requirement is covered by the public order requirement.

Second, a foreign judgement rendered by a court of a state the government of which Ethiopia opposes, for instance, a judgement from a state whose government is outlawed by the International Community for its grave violations of fundamental rights and human freedoms, is unlikely to be executed in Ethiopia.⁸⁷ Further, a foreign judgement will not be enforced in Ethiopia if it pertains to the recovery of proceeds of prostitution, though the contract may be held valid by the law of the foreign court, or debts from gambling, usury, sale of drugs or breach of any other contract considered unlawful under Ethiopian law.⁸⁸

Third, a foreign judgement which precludes an opposing judgement of an Ethiopian court rendered on the same cause of action, even if the Ethiopian judgement is given later is not executed.⁸⁹ As is expressly provided in its Civil Procedure Code, Ethiopia never attributes effect to a foreign judgement contradicting an Ethiopian judgement, even if the latter is not yet finalized.⁹⁰

And *fourth*, foreign judgements which are of a public law nature, such as administrative,⁹¹ tax⁹² and criminal judgements⁹³ are denied execution. Under the general principles of international law, the doctrine on the execution of foreign judgement applies only to civil and commercial matters. Public law judgements are

⁸³ Istvan Szaszy, p. 278.

⁸⁴ H. Graveson, *The Conflict of Laws*, 6th Edition, 1969, pp. 674-675.

⁸⁵ Marussia Barn - Reid, Recognition and Enforcement of Foreign Judgements, *International and Comparative Law Quarterly*, Vol. 3 Part. 1, 1954, pp. 49-50.

⁸⁶ Zelman Cowen, Foreign Judgements and the Defence of Fraud, *Law Quarterly Review*, Vol. 65, 1949, pp. 82-86.

⁸⁷ Ian Brownlie, *Principles of Public International Law*, 2nd Edition, 1973, pp. 101-108.

⁸⁸ *The Ethiopian Civil Code*, 1960, Article 1716.

⁸⁹ Istvan Szaszy, p. 279. See also *The Venezuelan Civil Procedure Code*, 1916, Article 748(4).

⁹⁰ *The Ethiopian Civil Procedure Code*, Article 8(2).

⁹¹ *The American Statement in the Conflict of Law*, Section 443.

⁹² Albert A. Ehrenzweig and Erick Jayme pp. 79-80.

⁹³ *Ibid.*

considered to be promoting the governmental interests of a foreign state for which Ethiopia, a sovereign and independent state, will not become an agent.

In the light of the principle of territoriality which no doubt has universal acceptance and respectable judicial support, countries are not willing to execute foreign penal laws.⁹⁴ In connection with the English courts, Cheshire has said that English courts would not lend its aid to the enforcement, either directly or indirectly, of a foreign penal law.⁹⁵

In this connection, a problem that deserves our concern is the determination of the status of a civil aspect of criminal judgement, as, for example, a grant of damages pronounced by a foreign criminal court to the victim of a crime. Should an Ethiopian court enforce that aspect of the judgement pertaining to the damages? As courts in many other countries execute such a judgement rendered by a foreign criminal court,⁹⁶ there seems to be no reason why Ethiopian courts should not follow this accepted practice. Moreover, under Ethiopian law, a suit for damages sustained as a result of a criminal act may be lodged separately in a civil division or tried together with the criminal aspect, in the criminal division.⁹⁷ Consequently, it appears immaterial whether the civil aspect of the judgement is rendered by a civil or a criminal Court; and the judgement should be executed by an Ethiopian Court.

Concerning foreign tax judgements, the "revenue rule", which is a rule of international practice, denies recognition and execution of them. For instance, courts in the United States do apply the paragraph "revenue rule" to refuse enforcement of foreign tax judgements.⁹⁸ In Ethiopia, certainly as a matter of public order, foreign judgements based on tax law could not be executed.

Conclusion

As is true of every member of the community of nations, increasing international intercourse will undoubtedly cause Ethiopia to have to deal with such problems as the execution of foreign judgements. As Ethiopia would like its judgements to be executed by foreign courts, so it is required to render similar treatment to judgements pronounced by foreign courts. In the desire to enable its courts to discharge their functions pertaining to the execution of foreign judgements, it is, therefore, necessary as well as timely for Ethiopia to consider revising the Civil Procedure Code's provisions on the execution of foreign judgements.

The author insists that special attention should, *inter alia*, be given to improving the requirements for the execution of foreign judgements provided for under the Code's Article 458. The requirements should be revised in such a way that courts could apply them with no or minimum difficulty. In other words, Ethiopia ought to clarify and

⁹⁴ The Lotus case (1927) P.C.I. J., see. A. No 10.

⁹⁵ G. C. Cheshire, *Private International Law*, 7th Edition, 1965, p. 329.

⁹⁶ Ignaz Seidl-Hohenveldern, , p. 113.

⁹⁷ *The Ethiopian Penal Code*, 1949, Article 100.

⁹⁸ In the case *Her Majesty the Queen. Etc. V. Gilberton*, 597 F. 2d 1161 (9th Cir. 1979). an Oregon court applied the 'revenue rule' to uphold the dismissal of an action to enforce a British Colombian tax judgement against Oregon citizens.

elaborate the Code's provisions so that they could easily be understood and applied. As they stand now, they are not sufficient to accommodate as many legal situations as similar provisions of the laws of other countries do. By revising the Code's provisions on the execution of foreign judgements, Ethiopia must get itself prepared for the inevitable Private International Law problems it encounters.